Litigation Update (July 21, 2004)

Miccosukee Tribe of Indians, Friends of the Everglades, Sugar cane Growers Cooperative of Florida v. DEP and ERC (DOAH Cases 03-2872RP, 03-2873RP, and 03-2884RP)

These consolidated cases are the challenges to the Proposed Phosphorus Rule brought before the State of Florida Division of Administrative Hearings. The issue was whether Proposed Rule 62-302.540, as formally noticed for adoption by the Department of Environmental Protection on July 18, 2003, is an invalid exercise of delegated legislative authority.

The Administrative Law Judge found in his Order dated June 17, 2004, that the Department and the parties aligned with the Department have shown by a preponderance of the evidence that those parts of the Proposed Rule appropriately challenged by the Tribe and Friends are not invalid exercises of the authority delegated to the Department by the legislature. The Judge therefore ordered that based on those findings, it is hereby determined that Proposed Rule 62-302.540 is not an invalid exercise of delegated legislative authority.

The State of Florida formally adopted the Rule on June 25, 2004.

Miccosukee Tribe of Indians of Florida v. State of Florida, Department of Environmental Protection, Environmental Regulation Commission (First District Court of Appeals)

The Miccosukee Tribe of Indians of Florida has filed a Notice of Appeal regarding the DOAH Order rendered on June 17, 2004, determining that adoption of the Department of Environmental Protection Rule Nos. 62-302.530 and 62-302.540 was a valid exercise of delegated authority pursuant to the Florida Administrative Procedure Act. The Tribe also appeals the publication and adoption of a revised version of the Rule sustained by the Order..

Association of Florida Community Developers v. DEP; South Florida Water Management District, Intervenor (DOAH)

This is a challenge by the Association of Florida Community Developers to DEP Proposed Rule 62-40, Water Resource Implementation Rule, including water reservations. The current Proposed Rule reflects language agreed upon in an earlier Settlement Agreement. This challenge is to the reservations portion of the rule. The parties have agreed to hold the Case in Abeyance until July 2005 and to Limit the Scope of Rule Challenge to Proposed Rule 62-40.474 (water reservations) and a proposed amendment to Rule 62-40.410(3) (cross-reference to water reservations). An ongoing Senate Natural Resources Reservations Workshop is currently being held in Tallahassee to attempt consensus on reservations bill language.

United States v. South Florida Water Management District (S.D. Fla., No. 88-1886) (consent decree)

This is the federal suit brought in 1988 against the Florida Department of Environmental Protection and the South Florida Water Management District concerning phosphorus pollution from agricultural runoff in the Everglades. On November 6, 2003, Judge Moreno appointed John Barkett, a Miami attorney, to serve as Special Master.

On April 1, 2004, plaintiff-intervenor the Miccosukee Tribe filed a Motion Seeking a Declaration of Breach by the District concerning the District's implementation of Stormwater Treatment Area 3/4 and exceedances of interim phosphorus levels in Loxahatchee National Wildlife Refuge. On April 16, 2004, the settling parties and certain intervenors filed oppositions to the Tribe's motions for declaration of breach by the state defendants.

At a status conference on May 19, 2004, Judge Moreno adopted the United States' position that the government parties and Tribe should engage in dispute resolution under the consent decree before the court considers the Tribe's motions for declarations of breach. Additionally, the court ordered the parties to submit a report by May 28 informing the court of the status of the issues that the Settling Parties and Tribe have agreed to discuss in dispute resolution. The court further informed the parties that all pending motions remain outstanding.

The Settling Parties and Tribe notified the Special Master on May 26, 2004, and the court on May 27, that the parties had productive dispute resolution discussions on May 19 and, although no issues were resolved, sufficient interaction occurred to encourage further discussions. The Settling Parties and Tribe agreed to go forward with confidential settlement negotiations on all of the issues raised in the Tribe's December 8, 2003, "Notice by Miccosukee Tribe of Seeking Mediation and Notice of Intent to Move for Enforcement of Consent Decree," and agreed to continue dispute resolution on June 7 and 8 in Miami, and on July 7 in Washington, D.C.

In the event that the settling parties and the Tribe are unable to resolve the issues raised in the Tribe's motions, the court has scheduled an evidentiary hearing for September 15, 2004, in Miami.

South Florida Water Management District v. Miccosukee Tribe (U.S. Supreme Court/S.D. Fla., Nos. 98-06056/98-06057) (S-9 pumping station)

In this case, the Miccosukee Tribe brought a Clean Water Act ("CWA") citizens' action alleging that the South Florida Water Management District should be required to obtain a federal National Pollutant Discharge Elimination System ("NPDES") permit to transfer phosphorus-bearing stormwater through the S-9 pumping station from the C-11 basin to Water Conservation Area 3A in western Broward County. Both the water management district court and the U.S. Court of Appeals for the Eleventh Circuit determined that a permit was required even though the district did not itself add anything to the water that was being pumped. On March 23, 2004, the U.S. Supreme Court vacated the decisions below and held that discharges of pollutant requiring a NPDES permit include point sources that do not themselves generate pollutants. The Court remanded the case for a ruling on whether the C-11 canal and WCA-3 are "meaningfully distinct water bodies," such that an NPDES permit would be required in this case. Judge Lenard will preside over any further proceedings.

Miccosukee Tribe v. United States (11th Cir./S.D. Fla., No. 00-33) (Interim Structural and Operations Plan)

In a complaint filed in January 2000, the Miccosukee Tribe and several South Miami-Dade County agricultural interests claimed that the U.S. Army Corps of Engineers' ("Corps") Interim Structural and Operational Plan ("ISOP") was implemented in violation of the National Environmental Policy Act ("NEPA"), the Endangered Species Act, and other laws. On February

28, 2003, Judge Moore entered an order adopting Magistrate Judge O'Sullivan's report and recommendation to dismiss this case as moot in light of the Corps' implementation of the Interim Operating Plan. On April 15, 2004, the U.S. Court of Appeals for the Eleventh Circuit issued an order affirming the decision below and declining the Tribe's request to compel the Corps to complete after-the-fact NEPA work on the ISOP. The court reasoned that "requiring that the Corps write an [Environmental Impact Statement] would constitute an inconsequential formality that does not accomplish any of NEPA's objectives."

Miccosukee Tribe of Indians v. U.S. Army Corps of Engineers (S.D. Fla., No. 02-22778) (Interim Operational Plan)

This is a challenge by the Miccosukee Tribe to the Army Corps' Interim Operational Plan ("IOP") to avoid jeopardy to the endangered Cape Sable Seaside Sparrow in the Florida Everglades. The complaint, filed on September 20, 2002, alleges violations of the National Environmental Policy Act, the Endangered Species Act, the Administrative Procedure Act ("APA"), and the Federal Advisory Committee Act ("FACA"), the Due Process Clause, and the Indian Trust Doctrine. On April 16, 2004, the Tribe filed a motion to reopen discovery with respect to its FACA claim, which the Corps opposes. The parties are awaiting a ruling on this motion. The court previously granted the Corps' motion for partial judgment on the pleadings dismissing the Tribe's due process, federal common law nuisance, and Indian trust doctrine claims.

Miccosukee Tribe v. Southern Everglades Restoration Alliance (S.D. Fla., No. 99-1315)

In a complaint dated May 7, 1999, the Miccosukee Tribe alleges that various federal agencies and officials participated in the Southern Everglades Restoration Alliance ("SERA") in violation of the Federal Advisory Committee Act. The Tribe alleges that the defendants unlawfully relied on advice from SERA, which has caused continuing damage to tribal lands in the Everglades. On April 30, 2004, the federal defendants filed a motion for judgment on the pleadings asserting that FACA neither waives sovereign immunity nor provides a private right of action.

Biodiversity Legal Foundation v. Norton (D.D.C., No. 00-3030) (Cape Sable seaside sparrow)

Plaintiffs in this case challenged the U.S. Fish and Wildlife Service's ("the Service") alleged failure to respond to plaintiffs' petition to revise critical habitat for the endangered Cape Sable seaside sparrow. On December 31, 2003, the court issued a final order directing the Service to complete a revised critical habitat determination by October 27, 2007.

Natural Resources Defense Council v. United States (S.D. Fla., No. 99-2899) (Cape Sable seaside sparrow)

In a complaint filed October 27, 1999, NRDC and other environmental groups alleged that the Corps was harming the endangered Cape Sable seaside sparrow through its operation of the Central and Southern Florida ("C&SF") Project, in violation of the Endangered Species Act. In particular, plaintiffs alleged that the Corps failed to implement the reasonable and prudent alternative set forth in a biological opinion issued by the U.S. Fish and Wildlife Service on February 19, 1999. The court never ruled on the merits of plaintiffs' claims, and plaintiffs

voluntarily dismissed their complaint on November 7, 2002. However, plaintiffs are seeking an award of attorneys fees. Plaintiffs contend that this lawsuit was a catalyst for the Corps' decision to adopt the IOP.

On September 9, 2003, Judge Moore issued a decision adopting Magistrate Judge O'Sullivan's determination that NRDC is eligible for a fee award. Now that the court has ruled on the eligibility issue, the parties are awaiting a decision as to the appropriate amount of NRDC's fee award.

Wildlife Conservation Fund v. Norton (M.D. Fla., No. 01-25) (Big Cypress ORV)

This is a challenge to an Off-Road Vehicle ("ORV") management plan for the Big Cypress National Preserve brought by ORV users. On August 1, 2003, the Magistrate Judge issued his report and recommendation finding that the Park Service's ORV management plan reasonably balances the agency's desire to permit ORV users access to the Preserve while minimizing the impacts of ORVs on natural resources, including several threatened and endangered species. The Magistrate Judge concluded that the administrative record amply demonstrates that the Park Service complied with NEPA by tiering its alternatives analysis off of a 1991 General Management Plan/EIS and by providing the public with an adequate opportunity to comment on both the draft and final ORV management plan. On September 16, 2003, the United States responded to Plaintiffs' objections to the Magistrate Judge's Report and Recommendation. The parties are awaiting a final decision.

Sierra Club v. Flowers (S.D. Fla., No. 03-23427) ("lakebelt" mining permits)

In a complaint filed originally in the U.S. District Court for the District of Columbia on August 20, 2002, Sierra Club and other environmental groups challenge the U.S. Army Corps of Engineers' decision to issue 12 permits for the discharge of dredge and fill materials into waters of the United States under Section 404 of the Clean Water Act, 33 U.S.C. § 1344. The permits authorize ten mining companies to conduct limerock mining on 5,409 acres of wetlands in northwestern Miami-Dade County, Florida. Plaintiffs allege violations of the Endangered Species Act, National Environmental Policy Act, and CWA. The parties have filed cross-motions for summary judgment, and oral argument is scheduled for August 23, 2004.

National Wildlife Federation v. Brownlee (D.D.C., No. 03-1392) (Corps nationwide permits/Florida panther)

This case, filed June 30, 2003, challenges the Corps' decision to issue Nationwide Permits ("NWP's") 12, 14, 39, and 40, pursuant to Section 404 of the Clean Water Act. Plaintiffs request the court to enjoin the Corps from using NWP's 12, 14, 39, and 40 to authorize development in Florida panther habitat pending further Endangered Species Act consultations, CWA assessments, and additional analyses under the National Environmental Policy Act. Agripartners, LLP has joined the case as an intervenor-defendant, and the Florida Association of Community Developers and the Utility Water Act Group are appearing as *amicus curiae*. The parties have completed briefing on cross-motions for summary judgment, and oral argument is scheduled for July 6, 2004.

National Wildlife Federation v. Norton and Brownlee (D.D.C., No. 03-1393) (Ft. Myers Mine

#2/Florida panther)

This case, filed June 30, 2003, challenges the U.S. Army Corps of Engineers' decision to issue a Clean Water Act Section 404 permit for the discharge of dredge and fill material into waters of the United States in connection with a limestone rock mine (Florida Rock Industries Fort Myers Mine # 2) in southwestern Florida. Plaintiffs also challenge the substance of a biological opinion rendered by the U.S. Fish and Wildlife Service concerning the project. Plaintiffs allege that the mining operations will destroy 5,217 acres of possible Florida panther habitat in violation of CWA, the Endangered Species Act, and the National Environmental Policy Act. Florida Rock Industries has joined the case as an intervenor-defendant. The parties have completed briefing on cross-motions for summary judgment, and oral argument is scheduled for July 6, 2004.

Floridians for Environmental Accountability & Reform v. U.S. Army Corps of Engineers (M.D. Fla., 02-530) (Corps nationwide permits)

This case challenged the U.S. Army Corps of Engineers' decision to implement Clean Water Act Section 404 NWP's in Florida. Under the terms of a recent settlement, the Corps agreed to conduct watershed-specific cumulative impact assessments. The Corps will complete a pilot study of two watersheds by October 1, 2005. The Corps will complete cumulative impact assessments for remaining Florida watersheds by March 18, 2007, when the current NWP's expire. In light of the settlement, the case was dismissed by order filed June 24, 2004.

Indian Riverkeeper v. United States Corps of Engineers (S.D. Fla., No. 03-81003) (Lake Toho)

This case, filed in November 2003, challenged a U.S. Army Corps of Engineers decision to allow the Florida Department of Fish and Wildlife Commission to conduct a drawdown of Lake Tohokopeliga ("Lake Toho") - a lake in the Kissimmee River Basin in Florida above Lake Okeechobee - to eliminate noxious weeds, etc. Plaintiffs filed a motion for a preliminary injunction alleging that the Corps did not comply with the National Environmental Policy Act and did not adequately assess the environmental impacts associated with the drawdown. Judge Middlebrooks held a hearing on the motion on December 17, 2003. On December 24, 2003, the court issued an opinion denying the injunction, finding that the plaintiffs had not shown the likelihood of success on the merits. On April 20, 2004, the court granted plaintiffs' motion for voluntary dismissal.

Florida Marine Contractors v. Williams (M.D. Fla., No. 03-229) (Florida manatee/dock permits)

Plaintiffs' original complaint, filed May 13, 2003, alleged that the U.S. Fish and Wildlife Service unreasonably delayed issuing biological opinions on hundreds of U.S. Army Corps of Engineers permits for the proposed discharge of dredge or fill materials into waters of the United States in connection with the construction of private docks, marinas, and public piers in Florida waters. Therefore, plaintiffs requested the court to compel the Service to issue biological opinions for projects that plaintiffs alleged were in Endangered Species Act consultation for more than 150 days. Plaintiffs also allege that the Service has unlawfully applied the incidental take provisions of the Marine Mammal Protection Act ("MMPA") in withholding incidental take

authorizations. Plaintiffs request the court to declare that the MMPA is inapplicable to activities occurring in inland Florida waters.

On April 22, 2004, Judge Moody issued an order granting the Service's motion to dismiss. Judge Moody held that plaintiffs' unreasonable delay claims were moot, because the Service had already issued the biological opinions in question. Judge Moody also held that plaintiffs' MMPA claims were unreviewable to the extent that they failed to challenge any particular final agency action in accordance with the Administrative Procedure Act.
On May 12, 2004, plaintiffs filed a second amended complaint alleging that the Service has unlawfully applied the MMPA in withholding incidental take authorizations for a number of specific dock construction proposals subject to Corps permitting. The issue before the court is whether the Congress intended for the Service to enforce the MMPA within Florida's inland waterways. The Service has filed a motion for judgment on the pleadings concerning the applicability of the MMPA. Save the Manatee Club and several other environmental groups have moved to intervene.

City of Cape Coral v. United States Fish and Wildlife Service (M.D. Fla., No. 03-497) (Florida manatee/dock permits)

This lawsuit, filed August 28, 2003, alleges that the U.S. Fish and Wildlife Service unreasonably delayed issuing biological opinions on hundreds of U.S. Army Corps of Engineers permits for the proposed discharge of dredge or fill materials into waters of the United States in connection with proposed dock construction projects within the City of Cape Coral. The City also challenges the merits of a final rule that regulates the operation of watercraft on the Caloosahatchee River and in San Carlos Bay. The Service has issued biological opinions on all of the projects identified in plaintiffs' complaint, and the United States filed a motion to dismiss all claims on various jurisdictional grounds. Save the Manatee Club and several other environmental groups have moved to intervene.

City of Layton v. INS (S.D. Fla., No. 02-10073) (Florida manatee)

In this case filed September 10, 2002, the municipal plaintiff challenges the Environmental Assessment ("EA") supporting the U.S. Immigration and Naturalization Service's decision to relocate its Border Patrol Interim Processing Center to a site in the Florida Keys. Plaintiff alleges that the EA did not properly consider the new Center's effect on the endangered Florida manatee, meaningful programmatic alternatives, and various socioeconomic consequences of moving multiple immigration detention cells to a small, primarily residential town. On March 25, 2004, the Court denied plaintiff's motion for supplemental discovery. A briefing schedule on the merits of the case has not yet been established.

Florida Key Deer v. Brown (S.D. Fla., No. 90-10037) (key deer)

This is a long-running case challenging the Federal Emergency Management Agency's ("FEMA") administration of the National Flood Insurance Program in Monroe County ("NFIP"), Florida. In 1997, pursuant to a previous court order, FEMA completed Endangered Species Act consultation with the U.S. Fish and Wildlife Service concerning the NFIP. FEMA has implemented the reasonable and prudent alternatives recommended by the Service in the consultation. However, plaintiffs allege that FEMA is still failing to ensure that its activities will

not jeopardize the endangered Florida Key deer and other threatened and endangered species. On December 3, 2003, Judge Moore heard oral argument on the parties' cross-motions for summary judgment on plaintiffs' second amended complaint. The parties are awaiting a decision on the merits of the case.

Sierra Club v. Leavitt (N.D. Fla., No. 04-00120) (Section 303(d) list)

In this complaint filed April 22, 2004, plaintiffs challenge the U.S. Environmental Protection Agency's approval of Florida's list of impaired waters that require specification of Total Maximum Daily Loads pursuant to Clean Water Act Section 303. Plaintiffs allege that EPA arbitrarily and capriciously (1) approved Florida's 2002 303(d) list; (2) approved the delisting of certain waters from the 1998 303(d) list; and (3) failed to add certain waters to the 1998 and 2002 303(d) lists.

Miccosukee Tribe of Indians of Florida v. EPA (S.D. Fla., No. 04-21448) (2003 amendments to Everglades Forever Act)

In this complaint filed June 17, 2004, the Miccosukee Tribe challenges the U.S. Environmental Protection Agency's determination that the State of Florida's 2003 amendments to the Everglades Forever Act do not constitute a change to state water quality standards. The Tribe alleges violations of the Clean Water Act and the Administrative Procedure Act.

Everglades land acquisition litigation (S.D. Fla./M.D. Fla.) (various cases)

Referral and filing of eminent domain cases on behalf of the U.S. Department of the Interior for expansion of Everglades National Park is nearly complete. Since December 2003, six additional cases have been filed in U.S. District Court for the Southern District of Florida, bringing the total to approximately 2,700. Over half the cases have been satisfactorily resolved through trial or settlement, with verdicts received in grouped cases consistent with the government's valuation testimony. Still pending before the court are pre-trial motions in one case, United States v. 480 Acres of Land in Miami-Dade County, Florida, and Gilbert Fornatora, et al. (S.D. Fla., No. 96-1249), on which briefing and argument were conducted from June 2001 to March 2002. Because the results in large numbers of similarly situated cases may be affected by the precedential effect of the rulings, defendants in approximately 109 cases have elected to defer trials until after the court enters decisions on the Fornatora motions. The U.S. Attorney's Office has moved to consolidate 56 other cases for trial in July 2004, 46 in August 2004, 30 in September 2004, and 12 in October 2004. The court has agreed and set trial dates. The U.S. Attorney's Office has also moved to set consolidated trials in 113 additional Everglades National Park cases in December 2004 and January 2005.

Thirty six new condemnation cases have been referred this year by the Department of the Interior for expansion of the Big Cypress National Preserve in the Middle District of Florida.

One condemnation case went to trial on behalf of the U.S. Army Corps of Engineers in Palm Beach County in April 2004: United States v. 35.40 Acres of Land in Palm Beach County, Florida and Rustic Ranches, et al. (S.D. Fla., No. 02-80382), extinguished easements inuring to the benefit of subdivision homeowners for the Corps' Canal 51 project. Of the nearly 380 property owners and other interested parties (e.g., lienholders), approximately 116 settled for $100 - $500 each or disclaimed their interests, with the remaining 264 electing to go to trial.

Each sought $50,000 - $100,000 in just compensation. At trial, the jury found no diminution in market value resulting from extinguishment of the easements and awarded no compensation. Since January 2004, the Corps of Engineers has referred 12 additional eminent domain cases with total estimated just compensation of $704,360 in connection with the Corps' Modified Waters project to improve water deliveries to the Everglades.